COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ANTHONY WARD, et al.	:	Case No. A9802474
Plaintiffs	:	Judge Davis
vs.	:	MAGISTRATE'S DECISION ON RULE
JOHN H. WEHBY	:	60B MOTION
Defendant.	:	

RENDERED THIS 8TH DAY OF SEPTEMBER, 1999.

This matter is before the court on the Ohio Civil Rule 60B motion filed by the defendant. The court held a hearing in this matter at which several witnesses testified for each side. In addition, the court admitted two affidavits in order to conclude the matter, rather than continue it to a later date. Counsel for the plaintiff did not object to the admission of the affidavits.

From the evidence, it appears that defendant has been a medical doctor, (M.D.) since 1977. He is 53 years old and states that he is now retired from medical practice. Prior to this retirement, he practiced medicine out of his medical office located at 7836 Beechmont Ave., Cincinnati, Hamilton County, Ohio. In the matter before the court, he treated Anthony Ward during the years between in 1982 and 1997. Ward's complaint alleged that defendant negligently failed to diagnose a squamous cell carcinoma on Ward's vocal chord.[1] As a result, Ward suffered from a more involved form of cancer and was forced to undergo lengthy treatments which if the cancer had been diagnosed earlier, would have been substantially less. Following a lengthy default hearing, the court awarded judgment to Ward in the amount of

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[1] This later involved both vocal chords.

$100,000.00, see Amended Magistrates Decision filed herein.

Defendant states that he is an antique buff, buying and selling antiques. He stored many of these antiques at his office located at 7836 Beechmont Ave., Cincinnati, Hamilton County, Ohio. Defendant stopped seeing patients at this office on a regular basis in the latter part of 1997. During 1997, 1998, and approximately half of 1999, defendant continued to rent the premises at 7836 Beechmont Ave. and continued to pay his telephone bill and gas and electric bill for that premises. According to the defendant, he did not go to the office regularly, and mail was placed by the postal carrier in the mailbox or under the door. Upon arriving at the office defendant placed any mail that he found in one of the rooms at 7836 Beechmont Ave. He testified that he did not open any of the mail. At some point in time, the U.S. Postal Service contacted defendant to claim mail that was being held at the Post Office. Later, defendant hired someone to claim all of the mail and weed through it in order to remove any checks. This person was later instructed by defendant to dispose of all other mail.

Procedurally, plaintiffs obtained service by ordinary mail on their complaint being informed that the defendant failed to claim the original certified mail service issued by the Clerk of Courts. This service was made at defendant's office at 7836 Beechmont Ave. Defendant claims that he never received any service from the Clerk of Courts, that he has never opened any mail from the Clerk of Courts, and that his residence address was discernable if proper efforts were made to find it. It should be noted that the only phone number listed in the Cincinnati phone book for defendant was 7836 Beechmont Ave. Defendant had an unlisted home phone.

This court finds that defendant's contention that he can literally place mail addressed to him in a pile, or just throw it away and not be charged with any responsibility for its contents is without merit. The plaintiffs followed the civil rules precisely. they found that defendant maintained an office with a working

phone number. Mail that was delivered to that office was not returned to the sender but just piled up either in the mailbox, the front room of defendant's office or the post office. Defendant's testimony that he hired someone to look for the checks and throw the rest of the mail aware merely advances the court's perception that the defendant was acting irresponsibly towards his affairs. this irresponsibility is not excusable neglect under Civil Rule 60B.

Notwithstanding the above, the following is set forth in *Kadish, Hinkel & Weibel Co., L.P.A. v. Rendina*, (1998), 128 Ohio App.3d 349,

> '[T]o prevail on a Civ.R. 60(B) motion, the movant must demonstrate that: (1) [he] has a meritorious defense or claim to present if relief is granted; (2) [he] is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time.' [*GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 1 O.O.3d 86, 351 N.E.2d 113] at paragraph two of the syllabus.
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> GTE requires movant to show that he has a meritorious defense. A meritorious defense exists when the movant specifically alleges operative facts that support a defense to the judgment. *See Elyria Twp. Bd. of Trustees v. Kerstetter* (1993), 91 Ohio App.3d 599, 632 N.E.2d 1376, citing *BancOhio Natl. Bank v. Schiesswohl* (1988), 51 Ohio App.3d 130, 131, 554 N.E.2d 1362.
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> The Ohio Supreme Court has set forth the form that the movant's defense must take. For example, the movant's answer to the original complaint has been held to be a sufficient defense. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 520 N.E.2d 564. Furthermore, in *Rose Chevrolet*, the court held the movant is not required to submit

> supporting evidence of his defense. *Id.* at 20, 520 N.E.2d at 566-567. However, the movant's allegations must set forth the defense or his evidence must demonstrate that content exists in his allegations. Elrya at 602, 632 N.E.2d at 1378-1379. Above all, his allegations must aid the trial court in its decision on the motion.

During the hearing, the question was asked by counsel for the defendant:

Q. Do you have a defense to the claims made in this case?

Defendant responded:

A. Yes.

No further testimony was presented on this issue nor was any proposed answer tendered to the court. This response falls short of the requirements set forth above. In other words, the defense to the claim must somehow be made know to the court through a proposed answer or through testimony in open court.[2] The content of the answer or such testimony must be sufficient to aid the court in its decision as to whether a valid defense exists. Here, the court heard no such testimony nor did the court hear anything other than an affirmative response to the question set forth above. This fails to satisfy the first prong of the *GTE* case.

Defendant's actions do not rise to the level of excusable neglect under Rule 60(B). In addition, defendant has failed to satisfy the first prong of the *GTE* case.

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2 The court is not opining whether there might be other methods of bringing such defenses to the attention of the court.

DECISION

Defendant's motion to vacate the judgment under Ohio Civil Rule 60B is denied.

RICHARD A. BERNAT,
MAGISTRATE, COURT
OF COMMON PLEAS

Copies sent by Clerk of Courts to:

David A. Johns, Esq.
Patrick J. Beirne, Esq.
The Lawrence Firm
2100 Star Bank Center
425 Walnut Street
Cincinnati, Ohio 45202

Joseph K. Wehby, Esq.
10 Kyles Lane, Suite 212
Ft. Wright, Kentucky 41011

NOTICE

Objections to the Magistrate's Decision must be filed within fourteen days of the filing date of the Magistrate's Decision.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT COPIES OF THE FOREGOING DECISION HAVE BEEN SENT BY ORDINARY MAIL TO ALL PARTIES OR THEIR ATTORNEYS AS PROVIDED ABOVE.

Date: 9/8/99 Deputy Clerk: Deborah A. Long